Duquesne Law Review

Volume 22 | Number 4 Article 11

1984

International Law - Federal Jurisdiction - Arising under Clause - Foreign Sovereign Immunities Act of 1976

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INTERNATIONAL LAW—FEDERAL JURISDICTION—ARISING UNDER CLAUSE—FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976—The Supreme Court of the United States has held that in cases where a foreign plaintiff brings suit against a foreign sovereign under the Foreign Sovereign Immunities Act of 1976 federal courts may constitutionally exercise jurisidiction under article III of the United States Constitution.

Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962 (1983).

On April 21, 1975, Verlinden, B.V., a Dutch corporation with its principal offices in Amsterdam, entered into a contract with the federal government of Nigeria to sell cement to Nigeria.[1] It was agreed that the law of the Netherlands would govern the contract and that the International Chamber of Commerce, in Paris, France, would resolve any disputes between the parties.[2] The contract also stated that the Nigerian government was to furnish an irrevocable, confirmed letter of credit for the total purchase price through an Amsterdam financial institution.[3] The Central Bank of Nigeria, however, provided an unconfirmed letter of credit payable through Morgan Guaranty Trust Company in New York rather than the required confirmed letter.[4]

Verlinden, during August 1975, contracted to purchase the cement necessary to fill the Nigerian order.[5] In mid-September of 1975, the Central Bank of Nigeria unilaterally directed Morgan Guaranty Trust, as well as its other banks, to amend the letters of credit that had been issued to cover the cement contracts.[6] Following the mid-September amendment of its letter of credit, Nigeria determined to pay only for these cement shipments which had received Central Bank approval two months prior to their arrival in Nigerian ports and, so notified the suppliers.[7]

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1. Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962, 1965 (1983).
2. *Id.*
3. *Id.*
4. *Id.* at 1965-66.
5. *Id.* at 1966.
6. *Id.*
7. *Id. See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) for a general background of the events involved in the Nigerian cement cases. Verlinden was among 68 suppliers who had entered into 109 cement contracts with Nigeria. Nigeria had overbought cement and the mistake

Alleging that the Central Bank's action was an anticipatory breach, Verlinden, basing its claim for jurisdiction on section 2 of the Foreign Sovereign Immunities Act of 1976 (Act)[8] brought suit in the United States District Court for the Southern District of New York.[9] Claiming a lack of personal and subject matter jurisdiction, the Central Bank of Nigeria moved to dismiss.[10]

The district court held that federal courts may exercise subject matter jurisdiction under the Act when a foreign corporation sues a foreign sovereign.[11] The district court, however, dismissed the complaint, finding that the Act entitled the Central Bank to sovereign immunity.[12] The Court of Appeals for the Second Circuit agreed that the Act permits a foreign corporation to bring an action in federal court against a foreign sovereign.[13] It held, however, that such an extension of federal jurisdiction is unconstitutional, because it exceeds the scope of article III.[14] The Supreme Court granted certiorari[15] and reversed, holding that the circuit court had correctly construed the Act but that federal jurisdiction in such an action is constitutional.[16]

Chief Justice Burger, writing for a unanimous Court, began by voting that prior to 1952, foreign sovereigns were generally granted immunity from suit in United States courts upon request by the

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became apparent as the country's ports and docking facilities became clogged. As the amount of cement scheduled to arrive exceeded the country's infrastructure's capacity to absorb it, Nigeria chose to repudiate its contracts. 647 F.2d at 303-06.

8. 103 S. Ct. at 1966. *See* Foreign Sovereign Immunities Act, § 2, 28 U.S.C. § 1330 (1976). Section 1330 provides:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

Id.

9. 103 S. Ct. at 1966. *See* Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980).

10. 103 S. Ct. at 1966.*See* 488 F. Supp. at 1288.

11. 103 S. Ct. at 1966. *See* 488 F. Supp. at 1292-93.

12. 103 S. Ct. at 1967. *See* 488 F. Supp. at 1302.

13. 103 S. Ct. at 1967. *See* Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 324 (2d Cir. 1981).

14. 103 S. Ct. at 1967. *See* 647 F.2d at 328-29.

15. 455 U.S. 936 (1982).

16. 103 S. Ct. at 1967.

State Department.[17] In 1952, foreign sovereign immunity began to be restricted pursuant to the Tate Letter[18] which announced a new State Department policy of withdrawing immunity from the commercial acts of foreign states.[19] Chief Justice Burger noted that the policy embodied in the Tate Letter was not law, and that decisions concerning immunity were, in practice, made by two different branches of government.[20] Since initial responsibility for making sovereign immunity determinations usually fell on the State Department, its "suggestions" usually ruled. But when foreign nations did not make their request to the State Department, courts had responsibility to make the determinations. In order to clarify the confusion which inevitably resulted from this case-by-case approach to foreign sovereign immunity, Congress, in 1976, passed the Foreign Sovereign Immunities Act[21] which listed a set of legal standards to apply to foreign sovereign immunity claims.[22] According to Chief Justice Burger, the Act embodies the restrictive theory of foreign sovereign immunity as enunciated in the Tate Letter.[23]

Turning to the issue of whether the Act permits foreign plaintiffs to sue foreign defendents in federal courts, the Court agreed with the holdings of the district court and the court of appeals that the Act granted jurisdiction for such suits.[24] The Court noted that the terms of the Act do not contain any limitation on the citizenship of the plaintiff.[25] Reviewing the legislative history of the statute, the Court found that some of the history could be understood to support and implicitly limit[26] jurisdiction to suits brought by

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17. *Id. See* text accompanying notes 61-72.

18. 26 1952 DEP'T OF STATE BULL. 984. The Tate Letter was written by Jack B. Tate, acting legal advisor to the State Department. The letter was intended to be a policy pronouncement that the State Department would no longer grant immunity automatically to the commercial acts of foreign sovereigns in the United States. It was the intent of the Tate Letter to move United States policy from a position of granting absolute immunity to foreign sovereigns to a restricted one which grants immunity on a case-by-case basis. 103 S. Ct. at 1968.

19. 103 S. Ct. at 1968.

20. *Id.*

21. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891-92, 2894-98 (codified at 28 U.S.C. §§ 1330, 1441, 1604-1611 (1976)).

22. *Id. See Foreign Sovereign Immunities Act of 1976, Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 34-35 (1976) (testimony of Monroe Leigh, Legal Advisor, Department of State).

23. 103 S. Ct. at 1968.

24. *Id.* at 1969.

25. *Id. See* 28 U.S.C. § 1330(a) (1976). *See also supra* note 8.

26. 103 S. Ct. at 1969. *See* H.R. REP. No. 1487, 94th Cong., 2d Sess. 6 (1976).

American citizens.[27] Other statements from congressional debate, however, seem to extend access to the courts to any plaintiff.[28] The Court observed that Congress was aware of the possibility that a flood of suits by foreign plaintiffs would turn the federal courts into international claims courts[29] and chose to prevent that result by requiring some form of substantial contact with the United States[30] instead of by restricting the class of plaintiffs to United States citizens.[31]

The Court then addressed what it viewed as the crucial issue: whether Congress acted unconstitutionally in extending federal court jurisdiction to suits in which a foreign plaintiff sues a foreign government or instrumentality in United States courts.[32] The Court examined article III of the Constitution to determine whether the jurisdiction conferred upon the federal courts by the Act exceeded that article's grant of jurisdiction.[33] The Court stated that the diversity clause,[34] which extends judicial power to controversies between citizens of two or more states, foreign states, citizens and subjects, is not broad enough to permit federal courts to have jurisdiction over actions by foreign plaintiffs against foreign governments as it only grants federal courts jurisdiction in controversies between a state, or the citizens thereof, and foreign states.[35] The Court then turned to the second clause, the "arising under" clause[36] of article III and held that it provides the basis for the federal courts' subject matter jurisdiction in actions brought by

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27. 103 S. Ct. at 1969. *See* H.R. REP., *supra* note 26, at 6.

28. 103 S. Ct. at 1969. *See* H.R. REP., *supra* note 26, at 13.

29. 103 S. Ct. at 1969. *See Hearings on H.R. 11315, supra* note 22, at 31 (testimony of Bruno A. Ristau).

30. 103 S. Ct. at 1970. *See* 28 U.S.C. § 1605 (1976) (substantial contacts required to sue in United States courts).

31. 103 S. Ct. at 1970. *See* 28 U.S.C. § 1605 (1976).

32. 103 S. Ct. at 1970.

33. *Id.* at 1970-73.

34. The diversity clause, a portion of art. III, cl. 2, provides:

> Judicial power shall extend to . . . controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, cl. 2.

35. 103 S. Ct. at 1970. *See supra* note 34.

36. The arising under clause provides: "Judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority." U.S. CONST. art. III, cl. 2.

foreign plaintiffs.[37]

Chief Justice Burger turned to the early case of *Osborne v. Bank of the United States*[38] to illustrate the broad scope of the "arising under" clause.[39] According to the Chief Justice, *Osborne* reflects the broadest interpretation of the "arising under" clause to date.[40] He stated that while it is not necessary in the instant case to precisely delineate the limits of article III jurisdiction, the very nature of a suit against a foreign sovereign under the Act raises questions of substantive federal law at the initiation of the suit and, therefore, clearly "arises under" federal law within the meaning of article III.[41]

Chief Justice Burger then turned to the congressional power under article I, section 8, clause 9[42] to prescribe the jurisdiction of the federal courts.[43] Citing *Banco Nacional de Cuba v. Sabbatino*,[44] the Chief Justice stated that the primacy of federal concerns is clear when actions against foreign sovereigns are pursued in federal courts and, due to its authority over foreign relations and commerce, Congress' power to determine the circumstances under which foreign states can be sued in United States courts is undisputable.[45]

The Court stated that by enacting a statute which sets guidelines for suing foreign governments in United States courts, Congress properly exercised its rights under article I and was promoting the federal interest.[46] The Court held that, for the purposes of article III jurisdiction, an action against a foreign sovereign arises under federal law.[47] The Court went further, stating that subject matter jurisdiction in any action against a foreign sovereign depends upon the existence of one of the specific exceptions to foreign sovereign immunity. Therefore, the district courts must, at the outset of a suit, apply the Act in an action against a foreign

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37. 103 S. Ct. at 1970. *See supra* note 34.

38. 22 U.S. (9 Wheat.) 738 (1824).

39. 103 S. Ct. at 1970.

40. *Id.* at 1971.

41. *Id.*

42. U.S. CONST. art. I. § 8, cl. 9. This clause grants Congress the power "to constitute Tribunals inferior to the Supreme Court." *Id.*

43. 103 S. Ct. at 1971.

44. 376 U.S. 398 (1964).

45. 103 S. Ct. at 1971 (citing 376 U.S. at 423-25).

46. *Id. See* Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. §§ 1602-1607 (1976).

47. 103 S. Ct. at 1971.

sovereign.[48]

Chief Justice Burger discussed the court of appeals' view that, for article III purposes, a jurisdictional statute can never constitute the federal law under which an action arises.[49] According to the rule found in *Louisville & Nashville Railroad Co. v. Mottley*,[50] for the purposes of "arising under" jurisdiction, the federal question involved must appear on the face of the complaint and cannot attach in anticipation of a defense.[51] The Chief Justice discussed, also, the court of appeals' mistaken reliance on *Mossman v. Higginson*,[52] in which the Court held that a statute conferring jurisdiction over suits in which an alien is a party exceeded the scope of article III if construed to allow an action solely between two aliens.[53] In distinguishing *Verlinden* from these cases, he noted that, in addition to exercising its article I power to regulate foreign commerce, Congress, in the Foreign Sovereign Immunities Act, had codified an aspect of substantive federal law: the standards controlling the liability of a foreign sovereign in any court in the United States.[54] This is quite a different situation from *Mossman* which involved a jurisdictional provision of a judiciary statute and Georgia mortgage foreclosure laws[55] or *Louisville* which arose under a transportation regulation.[56]

Thus the primary purpose of the Act was to serve as a comprehensive regulatory statute.[57] According to the Court, Congress, in order to avoid possible conflicting results among the courts, had purposely attempted to channel suits against foreign sovereigns into federal courts.[58] The Court held that "since every action against a foreign sovereign necessarily involves application of a body of substantive federal law,"[59] the Act's grant of jurisdiction is

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48. *Id. See* Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. §§ 1605(a)(1)-(5), (b)(1)-(2) (1976) which detail the specific exceptions to foreign sovereign immunity.

49. 103 S. Ct. at 1972.

50. 211 U.S. 149 (1908).

51. *See* 72 C.J.S. *Pleading* § 426 (1952).

52. 4 U.S. (4 Dall.) 12 (1800).

53. 103 S. Ct. at 1972.

54. *Id.* at 1973. *See* H.R. REP., *supra* note 26, at 12 which recited the standards set by the Court in Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945), and Ex Parte Peru, 318 U.S. 578, 588 (1943).

55. 4 U.S. (4 Dall.) at 12.

56. 211 U.S. 149 (plaintiffs sued to overturn a federal transportation regulation which prohibited free railroad passes).

57. 103 S. Ct. at 1973.

58. *Id.*

59. *Id.*

within the limits of article III.[60]

In remanding the case to the court of appeals, the Court noted that its decision that the Act is in accord with the Constitution did not terminate the case.[61] The Court clearly indicated that subject matter jurisdiction must exist as well. Therefore, the case was remanded to the Court of Appeals for the Second Circuit to consider whether one of the Act's specific exceptions to immunity applies.

In *Verlinden*, Chief Justice Burger examined the historical development of the concept of foreign sovereign immunity in the United States. Prior to the adoption of the Foreign Sovereign Immunities Act in 1976 the Court followed two different approaches to the issue of foreign sovereign immunity.

The first approach originated in *The Schooner Exchange v. McFadden*[62] in which the Court held that United States courts lacked jurisdiction over an armed ship of a foreign nation found in a United States port.[63] Chief Justice Marshall, writing for the Court, upheld a plea of immunity. Bolstered by an executive branch suggestion, noting that a recognition of immunity was supported by international law[64] the Court held that the United States had impliedly waived jurisdiction over foreign sovereigns.[65] This "absolute" approach[66] was not mandated by the Constitution but, rather, was a matter of grace and comity on the part of the United States.[67] By the mid-twentieth century, the Court began to de-

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60. *Id.*

61. *Id.* at 1974.

62. 7 U.S. (7 Cranch) 114 (1812).

63. *Id.* A United States ship en route from Baltimore to Spain was seized by the French and made into a public vessel of the Napoleonic fleet. The original American owners of the ship attempted to attach the vessel when it put into port at Philadelphia. The Court held that a public vessel of a foreign sovereign at peace with the United States, coming into a United States port in a friendly manner, is exempt from the jurisdiction of the United States.

64. *Id.* at 137.

65. *Id.*

66. Under the absolute theory of foreign sovereign immunity, which encompasses both the government of a foreign state and the individual head of state, a state was exempted in almost every way from the jurisdiction of other countries unless it voluntarily submitted to the jurisdiction of the foreign court. *See* G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 139-42 (3d ed. 1976).

67. 103 S. Ct. at 1967. *See* Beers v. Arkansas, 61 U.S. (21 How.) 527 (1858). In *Beers*, the Court held that a sovereign cannot be sued without its consent in its own courts "or in any other" and called this "an established principle of jurisprudence in all civilized nations." *Id* at 529. *See also* Principality of Monaco v. Missouri, 292 U.S. 313 (1934), which held that the states of the union still possess attributes of sovereignty and may not be sued by foreign states without their consent. According to Chief Justice Hughes, speaking for the Court, "I do not conceive that any controversy can ever be decided, in these courts, between

crease its emphasis on international law and deferred to the State Department to the point where the State Department's suggestions concerning immunity were almost dispositive.[68] Thus on the eve of the 1952 issuance of the Tate Letter,[69] the United States policy toward sovereign immunity rested upon the "absolute" theory and a judicial deference to determinations of the executive branch concerning the status of a foreign sovereign's immunity.[70]

The Tate Letter marked the rise of the "restrictive" theory of foreign sovereign immunity in the United States.[71] Private or commercial acts of the foreign state or its instrumentalities were not given protection by this theory.[72] Chief Justice Burger noted in *Verlinden* that there have been many problems associated with the application of the Tate Letter doctrine.[73] Problems often arose when the foreign government did not request immunity from the State Department. As a direct result, courts were often left to resolve the issue of foreign sovereign immunity having only prior State Department decisions as guidelines.[74] This resulted in vague and non-uniform standards being applied by two different governmental branches.[75]

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an American state and a foreign state, without the consent of the parties." *Id.* at 323-24.

68. 103 S. Ct. at 1968. *See* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945), in which the friendly foreign sovereign was held not immune when the State Department had refrained from certifying immunity. The Court stated that:

> [I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch.

Id. at 35. *See* Ex Parte Peru, 318 U.S. 578 (1943). *Peru* held that a friendly foreign sovereign should be released as immune from suit when its claim of immunity had been recognized and certified to the court by the Department of State. *Id.* at 588. The Court also accepted State Department suggestions to grant foreign sovereign immunity even in a case that involved the commercial activity of the foreign sovereign. *See* Berizzi Brothers Co. v. S. S. Pesaro, 271 U.S. 562 (1926).

The United States approach to foreign sovereign immunity was theoretically based upon that absolute immunity of foreign sovereigns. The absolute theory, however, remained just that, a theory, as the courts, in practice, would yield to State Department determinations. It was precisely this deference of the courts which rendered the theory, as applied, less than absolute.

69. *See supra* note 18.

70. *Foreign Sovereign Immunities Act of 1976, Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 8 (1976).

71. *Id.*

72. *Id.*

73. 103 S. Ct. at 1968.

74. *Id.*

75. *Id.*

Simultaneous with the transition from the "absolute" to the "restrictive" theory of foreign sovereign immunity embodied in the Tate Letter was the evolution of the concept that the state courts' freedom of action in deciding foreign sovereign immunity cases was limited by federal policy. In *United States v. Pink*,[76] a state policy concerning foreign nationalization was forced to yield to federal policy as expressed in an executive agreement.[77] The state courts traditionally deferred to the federal government's power and interests and dismissed cases against foreign governments which claimed sovereign immunity.[78] The Court in *Verlinden* also pointed to *Zschernig v. Miller*,[79] which precluded state judicial inquiry where it would affect the federal government's ability to handle foreign relations.[80]

In order to clarify the situation and eliminate the confusion and

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76. 315 U.S. 203 (1942).

77. *Id.*

78. *See* Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923). In *Wulfsohn*, the New York Court of Appeals declared that it was not competent to review the acts of foreign governments, as to do so would interfere with the federal government's conduct of foreign affairs. 234 N.Y. at 376, 138 N.E. at 26. *See also* French Republic v. Board of Supervisors, 200 Ky. 18, 252 S.W. 124 (Ky. Ct. App. 1923) (French government not suable in state courts for nonpayment of taxes on private property of the foreign government); Mason v. Intercolonial Ry. of Canada, 197 Mass. 349, 83 N.E. 876 (1908) (state court has no jurisdiction in a personal injury case brought against a corporation wholly owned by the King of England); Miller v. Ferrocarrill del Pacifico de Nicaragua, 137 Me. 251, 18 A.2d 688 (1941) (action for recovery of compensation for legal services rendered to a foreign governmental agency could not be maintained in state court unless the foreign governmental agency consented to waive its immunity); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944) (state courts refused to enforce an order of attachment against a Mexican state mineral agency where the State Department suggested immunity); Nankivel v. Omsk All-Russian Government, 237 N.Y. 150, 142 N.E. 569 (1923) (suit for value of automobiles confiscated by General Kolchak's anti-Bolshevik, defacto government of Russia during the Russian Civil War dismissed due to immunity of foreign government from suit in state courts without its consent); F.W. Stone Engineering v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945) (bank account of an instrumentality of the Mexican government not attachable by creditors as state court has no jurisdiction over a foreign sovereign). In Chemical Natural Resources v. Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied*, 385 U.S. 822 (1966), the Pennsylvania Supreme Court held that a determination of immunity by the executive branch of the federal government is conclusive in state courts. 420 Pa. at 147, 215 A.2d at 877.

79. 389 U.S. 429 (1960). Zschernig, a resident of East Germany and heir of an American citizen who died intestate in Oregon, challenged Oregon probate laws which required an escheat to Oregon because United States citizens did not have a reciprocal right to take or hold property in East Germany. The Court held this statute to be an interference in the federal power over foreign affairs. *Id.*

80. *Id.* This decision criticized the Tate Letter saying, "[r]esolution of so fundamental . . . [an] issue cannot vary from day to day with the shifting winds of the State Department." *Id.* at 443.

political pressures caused by the case-by-case approach to the concept of sovereign immunity, Congress passed the Foreign Sovereign Immunities Act in 1976. By listing a set of legal standards to apply to immunity claims in actions against foreign states, political subdivisions, or instrumentalities, it was hoped that legal grounds would be the basis for decisions and that due process would be ensured by its procedures.[81]

The restrictive theory of foreign sovereign immunity as enunciated by the Tate Letter is embodied in the Act. Under section 1604 of the Act,[82] foreign states are normally immune from the jurisdiction of federal and state courts except as provided in sections 1605[83] and 1607 of the Act.[84] Included among the exceptions are actions in which the foreign state has impliedly or explicitly waived its immunity[85] and actions based on the commercial activities of the foreign sovereign that are either carried on in the United States or cause a direct effect in the United States.[86] The Act provides that when one of the specific exceptions to foreign sovereign immunity applies, the foreign state shall be liable to the same extent that any private individual would be under similar circumstances.[87] While commercial acts of sovereigns are not given

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81. *See* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L. L. 33 (1978), which concludes that one of the Act's goals is that "[d]ecisions are made on purely legal grounds and under procedures that ensure due process." *Id.* at 48.

82. Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1604 (1976).

83. Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1605(a) (1976). *See infra* notes 85-86 and accompanying text.

84. Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1607 (1976) (a foreign state will not be immune to counterclaims in actions brought by that foreign state, unless it would have been immune under section 1605).

85. Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1605(a)(1) (1976) states a foreign state will not be immune from jurisdiction in a case:

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

Id.

86. Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1605(a)(2) (1976). Section 1605(a)(2) states that a foreign state will not be immune from jurisdiction in a case:

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

87. Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1606 (1976) provides in part: "As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.*

immunity, unfortunately, in many situations, the Act is not clear on what constitutes commercial activity.[88]

The Act provides that its standards control in both federal and state courts;[89] thus, suits may be brought in either federal or state courts.[90] The foreign state has the right to remove civil actions to federal courts.[91] This reflects the importance of taking into consideration diplomatic and political sensitivities which the federal courts are better prepared to handle.[92] It also highlights the necessity of developing a uniform body of law concerning foreign sovereign immunity since it is conceivable that, if left to decide these matters alone, the state courts could reach conclusions that conflict with the federal executive branch's foreign policy.[93] Under section 1330(a) of the Act, any permissible claim may be brought in federal court. The court, however, may lack subject matter jurisdiction if the claim does not fall into one of the specific exceptions to the foreign sovereign immunity doctrine.[94]

As noted by the Court, section 1330(a) of the Act is truly "unambiguous" on its face.[95] Limitations on the plaintiff's citizenship are indicated.[96] The legislative history of the Act, however, is not

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88. *See, e.g.*, United Euram v. Union of Soviet Socialist Republics, 461 F. Supp. 609 (S.D. N.Y. 1978). The *Euram* court rejected the defendant's contention that certain contracts by the Soviet Union to send performing artists to the United States were in furtherance of a policy of intercultural exchange and were not commercial activities for the sale of services. *Id.* at 611. *See also* Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978), in which the court held that Pezetel was an entity distinct from the state of Poland and, as such, could be held liable for antitrust violations in the golf cart industry. *Id.* at 396-97. *Cf.* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L. L. 239 n.139 (1979), which states that had the suit been against Poland for its governmental actions no jurisdiction would have been possible under 28 U.S.C. § 1605(a)(2) and no cause of action would have been possible under antitrust laws. *Id.*

89. Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1604 (1976), provides that: "[a] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." *Id.*

90. *Id.*

91. Foreign Sovereign Immunities Act of 1976, § 6, 28 U.S.C. § 1441(d) (1976), provides: "(d) Any civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where the action is pending." *Id.* 28 U.S.C. § 1330(a) also permits a claim to be brought from the outset in federal courts.

92. Foreign Sovereign Immunities Act of 1976, § 2(a), 28 U.S.C. § 1330(a) (1976).

93. 103 S. Ct. at 1969.

94. *Id. See* Foreign Sovereign Immunities Act of 1976, § 2(a), 28 U.S.C. § 1330(a) (1976).

95. 103 S. Ct. at 1969.

96. *Id.*

as clear as could be hoped for concerning the limitations on a plaintiff's citizenship.[97] The Court characterizes the legislative history as confused and muddled.[98] At one point the House Report states that the Act would give jurisdiction over "any claim with respect to which the foreign state is not entitled to immunity under Sections 1605-1607."[99] Another portion of the legislative history states that the Act's purpose was "to provide when and how parties can maintain a lawsuit against a foreign state or its entities."[100] In another instance the Report refers to the increasing number of disputes between "American citizens" and "foreign states"[101] and expresses the desire to ensure "our citizens . . . access to the courts."[102] The Court held that the Act and its legislative history did not clearly indicate congressional intent as to the citizenship of prospective plaintiffs under the Act and that it did not necessarily reveal an intent to limit jurisdiction under the Act to actions brought by United States citizens or domiciliaries.[103] Congress had taken into account the danger of opening the federal courts to a flood of potential foreign plaintiffs by enacting provisions which required substantial contact with the United States rather than by restricting the class of potential plaintiffs.[104] Some commentators speculate that suits against foreign sovereigns in United States courts may expand as socialist countries maintain that sovereign states are absolutely immune from jurisdiction of other nations' courts.[105]

The Chief Justice, writing for the Court, highlighted the complexity of the "arising under" problem in *Verlinden*.[106] The court

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97. *Id.*

98. *Id.*

99. *See* H.R. REP. *supra* note 26, at 3.

100. *Id.*

101. *Id.* at 6-7.

102. *Id.* at 6.

103. 103 S. Ct. at 1970.

104. *See Hearings on H.R. 11315, supra* note 22, at 31. *See also* Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. § 1605(a)(1) (1976).

105. N. LEACH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 308 (1973). *See also* East European Domestic Int'l Sales v. Terra, 467 F. Supp. 383 (S.D. N.Y. 1979), in which suit would have been barred in Romania but was permitted under the direct effect language of 28 U.S.C. § 1605(a)(2) which the court held required an examination of defendant's contacts with the United States in connection with the transaction. *Id.* at 388. Thus, the potential exists for the ideological conflicts between capitalist and socialist governments to enter the courtroom in the form of legal arguments and become crucial to the court's decision.

106. 103 S. Ct. at 1970-72. It should be noted that the correct interpretation of the meaning of the phrase "arising under" has been the subject of much scholarly dispute.

of appeals held that the Foreign Sovereign Immunities Act was merely a jurisdictional grant[107] and, as such, clashed with the well-known rule that a jurisdictional statute is not enough to meet the requirements of the "arising under" clause of the Constitution.[108]

The Court's analysis of the *Verlinden* problem quite perceptively noted that the Foreign Sovereign Immunities Act is more than a jurisdictional statute; it is a comprehensive framework governing the liability and immunity of foreign sovereigns in United States courts.[109] Prior to the Foreign Sovereign Immunities Act, judicial doctrine and State Department determinations controlled the subject of foreign sovereign immunity.[110] The intent of Congress, however, was to codify this judicial doctrine and apply it as an aspect of substantive federal law.[111] Thus, in practice, the Act, while substantive in nature, functions in a manner akin to a jurisdictional statute.[112] The court underscored the fact that the simi-

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Under some theories the *Verlinden* decision would have been a foregone conclusion. *See* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953). For a viewpoint that goes even further, see Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948).

107. 647 F.2d at 327 (2d Cir. 1981). *See* 103 S. Ct. at 1972.

108. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908), in which the Court interpreted the "arising under" clause to mean that a suit arises under article III only when the complaint shows that it is based on the Constitution. *Id.* at 152. Thus under this rule, the "well-pleaded complaint" rule, the plaintiff must show that his cause of action arises under federal law or the constitution, not merely that the plaintiff anticipates a defense and alleges that the defense is invalid under federal law or the Constitution. *See also* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (Frankfurter, J., dissenting), in which Justice Frankfurter stated that federal jurisdiction under the "arising under" clause, while limited to federal questions, is so flexible that Congress may confer it whenever there exists in the background a federal policy that might be challenged. *Id.* at 482 (Frankfurter J., dissenting). Justice Frankfurter's dissent also featured a thorough discussion of the "arising under" clause. *Id.* at 460-82 (Frankfurter, J., dissenting).

109. 103 S. Ct. at 1973. *See* H.R. REP., *supra* note 26, at 12.

110. *See supra* notes 62-80 and accompanying text for discussion.

111. *See* Comment, *"Arising Under," Verlinden*, 31 AM. U.L. REV. 1039, 1054-55 (1982); and Note, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 U. VA. L. REV. 893 (1982) which conclude that the Act is distinct from exclusively jurisdictional statutes due to its substantive principles of federal law.

112. *See* Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D. N.Y. 1978) in which the court, in discussing the substantive and jurisdictional provisions of the Act stated:

> The Act's central feature is its specification of categories of actions for which foreign states are not entitled to claim the sovereign immunity from American court jurisdiction otherwise granted to such states. These exceptions are contained not in the sections of the Act which describe the grounds on which jurisdiction may be obtained, however, but are phrased as substantive acts for which foreign states may be found liable by American courts. This effects an identity between substance and procedure in the Act, which means that a court faced with a claim of immunity from jurisdiction

larity is deceptive by stressing that in order to apply the substantive standards of the Act the court hearing an FSIA claim must, at the outset, inquire whether any of the Act's exceptions apply. If they do not, the plaintiff's claim will be barred by the substantive law of the Act.[113] It is this initial determination which led the court of appeals to hold that the Act was essentially jurisdictional in nature.[114] It is important to remember that the congressional intent to grant jurisdiction to the federal courts in suits involving foreign sovereigns was to divert such suits away from the state courts so that the potential for conflicting results among the state and federal courts would be reduced.[115] The Chief Justice was perceptive in holding that application of the Act invokes "arising under" article III jurisdiction because the application of the Act, a substantive body of federal law, is inherent in every foreign sovereign immunity action, due to the strong federal interests present.[116] Federal

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must engage ultimately in a close examination of the underlying cause of action in order to decide whether the Plaintiff may obtain jurisdiction over the defendant.

Id. at 851.

In *Yessenin-Volpin*, Alexander Yessenin-Volpin, "a persistent defender of the civil and human liberties of the Russian people," sought damages for libel against the TASS Agency and Novosti Press Agency for having written and published allegedly defamatory articles in *Sowjetunion Heute* and *Krasnaya Zvezda*, periodicals which are distributed in the United States. *Id.* at 850-51.

113. 103 S. Ct. at 1973.

114. 647 F.2d at 324-25.

115. *See supra* notes 76-93 and accompanying text. *See also* Note, *Suits by Foreigners Against Foreigners in U.S. Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1861 (1981) which noted that from the passage of the Act to 1981 only one suit was brought in state courts, Gittler v. German Information Center, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (1978). While suits against foreign sovereigns may be few in number they are important since they often involve large sums of money. *Verlinden* involved a claim for $4.5 million. *See, e.g.*, Ipitrade International S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978) which involved $9 million. *Id.* at 825.

116. Several cases involving foreign plaintiffs and foreign sovereign defendants have discussed the strong federal interest inherent in FSIA suits. For example, in Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980), *aff'd on remand*, 502 F. Supp. 259 (D.D.C. 1980), plaintiff's husband, the former Chilean ambassador, was killed when a bomb exploded in his car while he was en route to work. Plaintiff alleged that the bomb was planted at the direction of the Republic of Chile and its intelligence agency. Chile contended that the court had no subject matter jurisdiction, claiming immunity under the FSIA on the grounds that political assassinations are exempt due to their public, governmental character. Chile's claim of immunity was denied. Strong federal and foreign policy interests are involved in such cases not only due to diplomatic concerns, but, more importantly, because strong federal interests arise when a successful foreign plaintiff attempts to enforce his judgment by attaching the foreign sovereign's assets in the United States. *Id.* at 669. *See* Letelier v. Republic of Chile, 567 F. Supp. 1490 (S.D. N.Y. 1983), which arose when Mrs. Letelier, as a judgment creditor, moved for appointment of a receiver to attach property of the Chilean National Airlines in order to satisfy the judgment in the earlier *Letelier* case. *Cf.*

interests are particularly important, not only because the existence of sovereign immunity depends on the interpretation of substantive federal law, the Act, but also because complications may arise when a victorious foreign plaintiff seeks to enforce a judgment against the foreign sovereign by attaching the sovereign's assets in the United States.[117] Thus, the Act has, in a sense, merged the concepts of jurisdiction and immunity since under the terms of the Act jurisdiction depends on whether the facts meet one of the Act's specific exceptions from immunity.

The Act, however, poses an interesting problem which the *Verlinden* opinion did not reach. This problem is a troublesome lack of symmetry.

The Act, according to *Verlinden*, permits foreign corporations to bring suit in United States courts against foreign sovereigns, even when the complaint does not state a federal question. The lack of symmetry arises when one considers that a foreign sovereign would not be able to bring an identical suit in federal courts against a foreign defendant. This latter instance is not covered by the Act's provisions which grant jurisdiction, and does not meet any of the requirements of article III jurisdiction.

Thus, while the FSIA situation is neither ideal, nor the most clearly articulated intellectual concept, in light of "arising under" considerations, the Court's decision in *Verlinden* is the best that could be made, given the complexities of foreign sovereign immunity, international political considerations, the need for uniformity of decision, and the interests of justice.

Joseph S. Bielecki

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) which construed the Alien Tort Claims Act to allow a foreigner to sue the former head of the Peruvian secret police in the United States federal courts for torture inflicted in Peru since this promotes American human rights policy. *Id.*

117. *See supra* note 116.